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No. 92-387

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In The

Supreme Court of the United States

October Term, 1992

STEWART COUNTY, TENNESSEE, *et al.*,
Petitioners,

v.

ALLEN D. HEFLIN, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION

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QUESTIONS PRESENTED

Petitioners list six questions in their Petition, but Respondents submit that only two questions are properly raised:

1. Whether the Sixth Circuit misapplied established precedents in affirming the jury's factual determination that Petitioner Stewart County had acted with deliberate indifference to the serious medical needs of Respondents' decedent, a pretrial detainee attempting suicide, after finding him hanging by his neck in his jail cell?

2. Whether the Sixth Circuit erred in holding that the trial court did not abuse its discretion in applying the "will assist the trier of fact" test of Rule 702, Federal Rules of Evidence, in permitting the jury to hear a penologist's expert opinion that Stewart County's actions were "deliberately indifferent to [the pretrial detainee's] need for emergency care which could have saved his life"?

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RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION

STATEMENT OF THE CASE

Petitioners' statement of the case does not adequately describe the relevant facts and the reasoning of the Sixth Circuit.

Hugh Allen Heflin, a twenty-two-year-old pretrial detainee, committed suicide in the Stewart County, Tennessee jail. Respondents, the family of Heflin, sued Stewart County and employees of the jail in an action under 42 U. S. C. Sec. 1983. Respondents sought relief on the theory that Petitioners' conduct amounted to constitutionally deliberate indifference to the serious medical needs of Heflin. The case was submitted to a jury under an instruction that deliberate indifference must

be tantamount to an intent to punish or conduct that shocks the conscience. Pet. App. A12-A13. One of the factual issues the jury had to decide, based on conflicting testimony, was whether Heflin was still alive at the time he was found hanging by his neck in his cell. The jury resolved the factual dispute in favor of Respondents and awarded modest damages of $150,000. Petitioners appealed to the Court of Appeals for the Sixth Circuit. In its original opinion, the Sixth Circuit, in a 2-1 decision, affirmed both the trial court's denial of Petitioners' motion for a directed verdict and the jury's decision. Subsequently, the Sixth Circuit denied Petitioners' request for rehearing with a suggestion for rehearing en banc, except to dismiss the case against the individual employees of the jail. Pet. App. A26-A27. Thus, although the only remaining Petitioner is Stewart County, Respondents use the term "Petitioners," as their Petition does.

Petitioners raised a number of issues on appeal. Only two of the issues addressed by the Sixth Circuit are relevant to the questions presented in their Petition for certiorari. The facts relevant to those two issues are set out below.

First: Respondents argued in the Sixth Circuit that the evidence did not support the jury's finding of deliberate indifference. The Sixth Circuit disagreed, ruling that, based on conflicting evidence, reasonable minds could differ on whether the evidence supported a factual finding that Heflin was still alive at the time he was found hanging by his neck in his cell and on whether Petitioners acted with deliberate indifference to this serious medical condition. *See* Pet. App. A6-A7. Petitioners had allowed Heflin to remain hanging by his neck for at least eight minutes or more after they had discovered him, even though his body was warm and his feet were touching the floor. Pet. App. A6. None of the jail employees attempted to provide Heflin with emergency medical care. Pet. App. A7.

The evidence on whether Heflin was still alive when he was first discovered hanging by his neck included a statement made by Dr. Robert Lee, the County's Medical Examiner. Dr. Lee said that "[T]here'll probably be a hell of a lawsuit over this" after immediately directing emergency medical technicians to cut Heflin down and take him to Dr. Lee's office for an EKG. Pet. App. A5. The evidence also included testimony by Respondents' medical expert, Dr. Treat. Dr. Treat testified, without objection, that if Heflin had had a heartbeat when Dr. Lee finally examined Heflin in his cell, as some of Petitioners' witnesses testified, there was a ninety-five percent chance that Heflin could have survived if he had been cut down immediately and efforts to provide emergency medical treatment had been initiated. Dr. Treat also testified that, since Heflin's airway obstruction was only about eighty-five percent rather than total, Heflin could still have survived from somewhere between twenty minutes to an hour even with such an obstruction. Pet. App. A5-A6. Based on the conflicting evidence, the Sixth Circuit found that the jury could reasonably draw a factual inference that Heflin was still alive when Dr. Lee arrived, even though he had been hanging for twenty minutes or more. Pet. App. A4, A8.

The Sixth Circuit also noted that the record contained an "abundance of evidence" (Pet. App. A10) to support the jury's factual finding of deliberate indifference based, in part, on Respondents' theory that Petitioners' complete failure to provide Heflin with any medical assistance before the arrival of Dr. Lee was in retaliation for Heflin's filing of a complaint with the FBI. Heflin's FBI complaint grew out of a prior incarceration in the Stewart County jail and alleged that a jailer of Stewart County and a Tennessee state trooper had beaten him in violation of his civil rights. The FBI had begun an investigation of Heflin's complaint but had not concluded it at the time of Heflin's suicide. Pet. App. A2, A10.

When emergency medical technicians finally arrived at the jail, Heflin had been hanging about twenty minutes or more. Pet. App. A4. Although the emergency medical technicians were trained to give CPR, they made no effort to cut Heflin down or to otherwise provide medical assistance to him because the sheriff, who was stipulated to be the policymaker for the jail, had adopted a policy mandating that, in the absence of vital signs in a suicide case, "nothing [is to be done] until proper authority says do something." Pet. App. A7. The sheriff's policy was contrary to the training procedures taught by the Tennessee Corrections Institute that jailers are to follow in jail suicide cases. As a result of Heflin's FBI complaint, the sheriff had been interviewed by the FBI just a few months before Heflin's suicide. Pet. App. A2. In addition, a fellow prisoner, a trusty, came to Heflin's cell shortly after he was found hanging. The trusty, aware of Heflin's situation, had picked up a knife from the jail's kitchen and had taken it with him to Heflin's cell with the expectation that it would be used to cut Heflin down. Rather than use the knife to cut Heflin down, a jailer ordered the trusty out of the cell area, and, following the sheriff's policy, did not use the knife to cut Heflin down. Pet. App. A3.

Second: Petitioners alleged that the trial court committed reversible error in rejecting Petitioners' objection to the testimony of Repondents' penology expert, Mr. Ed Totten, who had used the phrase "deliberately indifferent" in his opinion testimony. Petitioners' objection was that this phrase was contrary to the philosophy of the Federal Rules of Evidence on expert testimony because it was tantamount to a conclusion of law. The context in which the expert made the statement shows that it was properly admitted:

> Jailers must presume that an inmate is alive and administer first aid until told by a physician to stop.

> Mr. Heflin was still warm when he was discovered. His feet were touching the floor. He was obviously in a life or death situation. For the Sheriff, Deputy Crutcher and Jailer Luffman to allow him to continue to hang unsupported and without lifesaving measures mandated by [Tennessee Corrections Institute standards that jailers should follow upon discovery of inmates attempting suicide] under these circumstances, is contrary to their training and common sense. In my opinion, they were deliberately indifferent to Mr. Heflin's need for emergency care which could have saved his life. Vol. III, Trial Transcript, at 94, 95.

The trial court rejected Petitioners' objection in denying their motion for a directed verdict, as did the Sixth Circuit. First, relying on Rule 704, Federal Rules of Evidence, the Sixth Circuit held that the expert's testimony was not inadmissible because it embraced an ultimate issue to be decided by the trier of fact. Second, based on the "will the evidence assist the trier of fact" test of Rule 702, the Sixth Circuit held that the trial court had not abused its discretion in allowing the jury to consider the expert's testimony which included the "deliberately indifferent" phrase. Pet. App. A12-A14. Third, the district court's instructions to the jury not only advised the jury to receive Mr. Totten's expert opinion with caution, but also correctly instructed the jury that the standard of deliberate indifference requires a finding that the Petitioners' conduct was tantamount to an intent to punish, or conduct which shocks the conscience. Pet. App. at A12-A13.

One of the issues Petitioners raise in their Petition is whether the Sixth Circuit properly applied the rule of *Anderson v. Creighton*, 483 U. S. 635 (1987). Question No. 4, Petition, at i. In *Anderson v. Creighton*, this Court held that state

actors sued in their individual capacity are entitled to qualified immunity from damages when sued in a Section 1983 constitutional tort claim unless the constitutional right at stake was "clearly established" at the time of the alleged deprivation. The issue whether the Sixth Circuit correctly applied the qualified immunity rule under *Anderson v. Creighton*, which was a major focus of Judge Kennedy's dissent (Pet. App. A21-A23), is moot because, on Petitioners' petition for rehearing with a suggestion for rehearing en banc, the Sixth Circuit held that only Stewart County was liable for damages. Pet. App. A26-A27.

REASONS FOR DENYING THE WRIT

I. SUMMARY OF ARGUMENT

Petitioners have taken a scattergun approach in attempting to articulate issues and reasons why this case has national importance worthy of the attention of this Court. For example, Petitioners have raised the issue of qualified immunity under *Anderson v. Creighton*, 483 U. S. 635 (1987), although that issue is now moot in light of the Sixth Circuit's decision on rehearing, dismissing the individual employees. Pet. App. A27. At bottom, they ask this Court to exercise its supervisory certiorari jurisdiction because they believe that the Sixth Circuit has departed from the usual and accepted course of judicial proceedings, or as they put it, the "opinion is simply wrong." Pet. at 19. Petitioners also argue that the Court should exercise its supervisory certiorari jurisdiction to resolve a purely intracircuit conflict, and they disagree with the result of the Sixth Circuit's review of the factual record on which the jury based its decision. Neither argument is sufficient, as a matter of law or fact, to satisfy the standards for certiorari review by this Court.

II. REVIEW BY THIS COURT IS NOT WARRANTED BECAUSE THE SIXTH CIRCUIT DID NOT DEPART FROM ESTABLISHED PRECEDENTS IN UPHOLDING THE JURY'S FACTUAL FINDING OF DELIBERATE INDIFFERENCE

In *Estelle v. Gamble*, 429 U. S. 97 (1976), this Court held that the standard of deliberate indifference to serious medical needs applies to claims by prisoners seeking redress for denial of medical attention while in prison. In *Roberts v. City of Troy*, 773 F. 2d 720 (6th Cir. 1985), the Sixth Circuit held that the *Estelle v. Gamble* standard applies in jail suicide cases involving pretrial detainees. In reaching that result, *Roberts* applied the reasoning in *Bell v. Wolfish*, 441 U. S. 520 (1979), in which this Court held that pretrial detainees who have not been convicted of any crime retain at least those constitutional rights that are enjoyed by convicted prisoners. *Roberts*, 773 F. 2d at 723. *See also Simmons v. City of Philadelphia*, 947 F. 2d 1042 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1671 (1992). Petitioners cite no cases, because there are none, in which the circuit courts have held that a standard other than the deliberate indifference standard applies to pretrial detainee jail suicide cases.

Petitioners argue that the decision below conflicts with this Court's decision in *City of Revere v. Massachusetts General Hospital*, 463 U. S. 239 (1983). Pet. at 19. But *City of Revere* has no applicability to the issues raised by Petitioners. The issue in City of Revere was whether a municipality's constitutional duty to provide medical care to a person injured by police officers in the performance of their duty includes a corresponding duty to compensate the provider of that medical care. 463 U. S. at 240.

The Sixth Circuit recognized that the evidence was in conflict as to whether Petitioners' conduct amounted to deliberate indifference to the serious medical needs of Heflin upon discovering him hanging by his neck in his cell. Pet. App. A9-A10. This factual dispute was submitted to the jury to resolve, and Petitioners do not challenge the sufficiency of the jury instructions on deliberate indifference. Fundamentally, Petitioners are asking this Court to exercise its supervisory certiorari jurisdiction to accept their version of the facts and inferences to be drawn from the evidentiary record and to overturn those of the jury and the Sixth Circuit.

Petitioners' arguments, when stripped of all their rhetoric, boil down to a disagreement with the factual record on which the jury made its decision and a personal attack on the Sixth Circuit as to how that court reviewed the evidentiary factual conflicts that had to be resolved by the jury. Thus, for example, Petitioners argue that the decision of the Sixth Circuit is based on "factual misperceptions and distortions," Pet. at 18; the Sixth Circuit "inaccurately perceive[d] the facts of the case," Pet. at 16; the decision below is based on "blatant misstatements" of the facts by the Sixth Circuit, Pet. at 17; the decision below is based on factual "insinuat[ions]" not supported by the record, Pet. at 17; and the Sixth Circuit engaged in "glib transmogrification of the fact[s]." Pet. at 18. This type of factual disagreement is not a proper basis for certiorari.

III. INTRACIRCUIT CONFLICTS ARE NOT A BASIS FOR EXERCISE OF THIS COURT'S CERTIORARI JURISDICTION

Petitioners' argument that this Court should exercise its supervisory certiorari jurisdiction because of an intracircuit conflict is also based on their disagreement with how the Sixth

Circuit reviewed the evidentiary record in this case and its "rank refusal" to reach the same results the court had reached in an earlier case, *Rich v. City of Mayfield Heights*, 955 F. 2d 1092 (6th Cir. 1992). Pet. at 5. *Rich*, like the instant case, involved the suicide of a jail inmate. The panel majority, however, found the evidence in *Rich* and the instant case to be significantly different. Pet. App. A18-A19. Apparently the members of the Sixth Circuit did not believe that the the two cases were in conflict because the court denied rehearing en banc. Pet. App. A26. Moreover, it has long been recognized that an intracircuit conflict is not a basis for granting a writ of certiorari. Intracircuit conflicts, to the extent they exist, ordinarily are left to resolution by en banc sittings of the courts of appeals. *See Davis v. United States*, 417 U. S. 333, 340 (1974). *See also Braxton v. United States*, 111 S. Ct. 1854, 1857 (1991) (principal purpose for which this Court uses its certiorari jurisdiction is to resolve conflicts between the circuits).

IV. THE ADMISSION OF THE TESTIMONY OF RESPONDENTS' PENOLOGIST EXPERT IS CONSISTENT WITH THE PHILOSOPHY OF RULE 704 OF THE FEDERAL RULES OF EVIDENCE

Petitioners also ask the Court to decide "[w]hether or not a non-qualified expert may give testimony containing legal conclusions." Pet. at i. The expert whose testimony is at issue is the Respondents' penologist expert, Edward Totten. The trial court found Mr. Totten to be qualified as a penology expert. Vol. III, Trial Transcript, at 83-84. Mr. Totten stated that, "In my opinion they were deliberately indifferent to Mr. Heflin's need for emergency care which could have saved his life." Pet. App. A12. Petitioners' argument is that the admission into evidence of Mr. Totten's testimony warrants the

exercise of this Court's supervisory certiorari jurisdiction to correct what they deem to be an uncorrected abuse of discretion by a district court under the Federal Rules of Evidence. Pet. at 14-15. But the reasons relied upon by the Sixth Circuit in upholding the discretion of the trial court in admitting the testimony simply do not raise an issue that warrants this Court's review, particularly so in the form raised by the Petitioners. Nor does the ruling create "blatant and irreconcilable conflicts" among the circuits. Pet. at 15. Once again, Petitioners point to no conflict with a decision of this Court or any other court of appeals, but simply believe the ruling of the Sixth Circuit was in error; but even this view is mistaken.

The ruling of the Sixth Circuit in upholding the exercise of discretion of the trial court to admit the testimony of Mr. Totten is consistent with the philosophy of the Federal Rules of Evidence on expert testimony. The test on the admissibility of testimony by a qualified expert under Rule 702 of the Federal Rules of Evidence is whether it "will assist the trier of fact to understand the evidence or to determine a fact in issue." And Rule 704 of the Federal Rules of Evidence abolished the long recognized "ultimate issue" objection. Fed. R. Evid., Rule 704, Note of Advisory Committee on 1972 Proposed Rules.

The Sixth Circuit gave clear and legally sufficient reasons in holding that the trial court's exercise of discretion satisfied the "assist the trier of fact" test of Rule 702. First, the court concluded that Mr. Totten's opinion was based on facts. His conclusion, based on those facts, was that Petitioners had completely disregarded well-established policies under Tennessee rules for jailers in dealing with inmates found hanging in their cells. Pet. App. A12. Second, the Sixth Circuit reasoned that Mr. Totten had used the phrase "deliberately indifferent" to state a fact as ordinary laymen do, and not to state a legal

conclusion. Pet. App. A12. Third, the Sixth Circuit reasoned that Mr. Totten's use of this phrase "merely emphasized [his] view of the seriousness of [Petitioners'] failures." Pet. App. A13-A14. Fourth, the Sixth Circuit found, as is clearly supported by the record, that the trial court had taken necessary steps in its instructions to the jury to preserve the jury's role as factfinder. The trial court had instructed the jury that Mr. Totten's opinion should be received with caution. Fifth, and most importantly, the trial court made clear in its instructions to the jury that the correct standard on deliberate indifference requires a finding that the conduct of Petitioners must be "tantamount to an intent to punish" or "conduct which shocks the conscience." Pet. App. A12-A13. The trial court's cautionary instruction and its clear statement of the appropriate standard were consistent with the philosophy of Rules 702 and 704. Petitioners have advanced no argument that the grounds on which the Sixth Circuit found that the trial court had not abused its discretion in admitting the testimony of Mr. Totten are in conflict with any legal standard.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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